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NO. 84-1749

SUPREME COURT OF THE UNITED STATES

October Term 1984

In re:

Victor L. Gelking,

Debtor

Phillip D. Armstrong, Trustee of the Estate of Victor Gelking,

Petitioner,

vs.

State Bank of Towner,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Counsel for Respondent:

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner has established that there are special and important reasons for granting this writ, as required by Supreme Court Rule 17.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, Armstrong v. State Bank of Towner (In re Gelking), 754 F.2d 778 (8th Cir. 1985) appears in the Appendix of Petition at page 9.

The Memorandum of Decision and Order of the District Court was not reported and appears in the Appendix of Petition at page 18.

The opinion of the United States Bankruptcy Court was not reported. It is Bankruptcy Case No. 81-05384.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

STATUTES INVOLVED

Section 503(c) of the Federal

Aviation Act of 1958, 49 U.S.C. § 1403(c), reads in part as follows:

Validity of Conveyances or Other Instruments; filing

(c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation...

STATEMENT OF THE CASE

Victor Gelking obtained from the State Bank of Towner a loan for the purchase of two aircraft. Subsequently, Gelking's financial obligations were consolidated in one note. The two airplanes were then exchanged for a 1978 Piper. The Bank at that time

released its liens on the two exchanged airplanes upon the debtor's execution of a new security agreement granting the Bank an interest in the Piper aircraft. The Aircraft Security Agreement was immediately sent for recordation to the Federal Aviation Administration in Oklahoma City, Oklahoma. The Aircraft Security Agreement was stamped as a conveyance and filed with FAA Aircraft Registry on two days: May 12, 1981 and July 20, 1981. The Security Agreement was ultimately recorded on November 17, 1981.

On August 21, 1981, the debtor filed for relief under Chapter 7 of the Bankruptcy Code. The Bank subsequently sold the aircraft on October 13, 1982

for $31,000.00. The Security Agreement entered into between the Bank and Victor Gelking reflects that the debtor had an outstanding obligation on the note to the Bank of $60,380.23.

Almost two years following the debtor's filing of a voluntary petition under Chapter 7, the trustee initiated adversary proceedings. The Complaint alleged that the Defendant, State Bank of Towner, had, at the commencement of the bankruptcy proceeding, an unperfected security interest in the 1978 Piper airplane.

The United States Bankruptcy Court found that the Bank's security interest had been perfected prior to the commencement of the bankruptcy proceeding, and ordered the dismissal

of the Complaint. The trustee appealed the Order to the United States District Court for the District of North Dakota, which affirmed the determination of the Bankruptcy Court. The trustee then appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals carefully reviewed and answered every argument raised by the trustee, and issued an opinion affirming the District Court.

ARGUMENT

Petitioner has Failed to Establish that there are Special and Important Reasons for Granting this Writ as Required by Supreme Court Rule 17.1

Petitioner incorrectly attempts to characterize the decision reached by the Court of Appeals for the Eighth Circuit

in this case as "in conflict" with the decision of this Court in Philko Aviation, Inc. v. Shacket, 462 U.S. 406. The Court of Appeals decided that under North Dakota statutes and case law, a perfected security interest did not require that the debtor be able to convey an interest which would be indefeasible and valid against third parties. Rather, the Court of Appeals concluded that less than full legal title would be sufficient and would satisfy the requirement that the debtor have "rights in the collateral."

Petitioner claims that in so deciding, the Court of Appeals erred, and looked to state law to settle a question properly left to federal law. Petitioner cites as support for his position Philko

Aviation, Inc. v. Shacket, supra, and South Shore Bank v. Tony Mat, Inc., 712 F.2d 896 (3d Cir. 1983), in which the Court of Appeals for the Third Circuit followed Philko. In Philko, this Court dealt with a different issue in holding that state laws allowing undocumented or unrecorded transfers of interests in aircraft to affect innocent third parties are pre-empted by the aircraft recordation provisions of § 503(c) of the Federal Aviation Act of 1958, 49 U.S.C. § 1403(c). Thus, the decision in Philko established the necessity of federally recording transfers of interests in aircraft in order to insure their validity against innocent third parties. The Court of Appeals explicitly followed the Philko holding that

federal recording is necessary to perfect a security interest in an airplane.

At issue here is not whether recordation of the interests in the aircraft was necessary, but whether recordation was in fact accomplished in this case. The Court of Appeals found that the bank's security interest in the airplane was perfected when the security agreement and bill of sale for the airplane were received, stamped and indexed by the Federal Aviation Administration. Even though the FAA did not actually record the security agreement until nearly seven months later, the document was indexed on the FAA records and, thus, gave notice to interested third parties of

the bank's security interest.

In deciding this issue, both the Court of Appeals and the United States District Court cited In re Farina, 25 Bankr. 411 (Bankr. D. Me. 1982). In Farina, it was held that perfection of a security interest in an airplane occurs on the date that the security agreement is filed for recordation with the Federal Aviation Administration. The Court of Appeals cited as well In re Disney, 24 Bankr. 155 (Bankr. D. Id. 1982) which also held filing for recordation sufficient to perfect a security interest.

In their careful examination of the issues in this case, neither the District Court nor the Court of Appeals overlooked Philko. Both courts cited Philko and explicitly

followed its holding requiring the recording of transfers of interests in aircraft in order to establish their validity against innocent third parties.

Review on writ of certiorari is a matter of judicial discretion and will be granted only when there are special and important reasons therefor. Fay v. Noia, 372 U.S. 291. "Special and important reasons" relate especially to issues reaching constitutional dimensions. Rice v. Sioux City Cemetery, 349 U.S. 70. No such issues of constitutional dimension are involved in this case, and although petitioner has erroneously attempted to characterize it as such, this case cannot be seen as presenting a conflict between the Court of Appeals for the Eighth

Circuit and this Court. Petitioner has failed to establish that there are special and important reasons for granting the requested writ.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully Submitted,

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